

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 15, 2007

JAMES ERIC WINSTON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 90-F-2077 Cheryl Blackburn, Judge

No. M2006-01699-CCA-R3-PC - Filed August 20, 2007

The petitioner, James Eric Winston, sought post-conviction relief in the Davidson County Criminal County Court in the form of deoxyribonucleic acid (DNA) analysis of physical evidence associated with his 1992 Davidson County aggravated rape convictions. The criminal court ordered the DNA analysis, but after reviewing the results, the court dismissed the petition. On appeal, the petitioner claims that his trial counsel rendered ineffective assistance, that the public defender's office, which represented the petitioner in his 1993 trial, had a conflict of interests that should have precluded a public defender from representing him in the criminal court on the post-conviction DNA proceeding now under review, and the DNA test results establish his claim of actual innocence of aggravated rape. These appellate claims are unsupported in the record, and therefore, we affirm the order of the criminal court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

James Eric Winston, Appellant, Pro Se (on appeal); and Ross E. Alderman, District Public Defender; and Amy Goodwin, Assistant Public Defender, in the post-conviction court.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel West Harmon, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

On June 17, 1992, a Davidson County Criminal Court jury convicted the petitioner, James Eric Winston, of especially aggravated burglary and two counts of aggravated rape. On direct appeal, this court affirmed the convictions but modified the sentences. *State v. James E. Winston*, No. 01C01-9302-CR-00069 (Tenn. Crim. App., Nashville, July 28, 1994), *perm. app. denied* (Tenn. 1994).

During the trial, the defendant pled guilty to the aggravated burglary charge involving the habitation of one Adam Mohammed Hussein. The facts supporting the guilty plea were that Mr. Hussein was at home in his apartment at 2044 Bernard Circle during the early morning hours of October 6, 1990, when he saw an individual remove the screen to his apartment window, reach in and remove his pants and wallet containing coins and papers with writing on them. Mr. Hussein described the burglar to the police as an African-American male. The police apprehended the defendant a short distance from the burglary[,] and he had Mr. Hussein's papers in his possession. The defendant admitted he committed the burglary after being informed of his *Miranda* rights.

The defendant agreed with the factual basis except for the fact of Mr. Hussein being present in the apartment. According to the defendant, the apartment was empty because he went through every room looking for something to steal.

The remaining convictions for two counts of rape and especially aggravated burglary involved a different victim, F.H., on the same night at 2019 Bernard Circle in the same apartment complex. F.H. testified that she awoke during the night to find a stranger beside her bed. The man told her to "shut up" and also said, "you are dead, you are dead." He beat her in the face with his fists, then covered her face with a pillow when she screamed. F.H. described the pressure applied with the pillow as "really hard." She stated that she may have lost consciousness for several minutes as a result. The assailant penetrated her vaginally while keeping the pillow over her head.

F.H. was able to remove the pillow from her face when the assailant loosened his hold during the vaginal penetration. She kicked the man, causing him to fall off the bed. F.H. got up off of the bed, but the man beat her on the face and shoulders. He also placed his hands on her neck and pushed. The assailant vaginally penetrated the victim a second time. At one point, when he had his hands on F.H.'s face, she bit his finger to leave an identifying mark for the police. The man responded by biting her finger. The assailant finally left, apparently through a window, when the police knocked on the apartment door.

F.H. gave a description of the assailant to the police. She testified that the light was on in her bedroom during the assault and

she was able to see the man's face at all times, except when her face was covered by the pillow.

F.H. was taken to the hospital. While there, she saw the defendant in one of the treatment rooms as she was being transported from the emergency department for x-rays. She identified him as the man who had raped and beaten her. She also identified the defendant at trial.

Id., slip op. at 2-4.

On June 13, 2005, the petitioner filed a petition for post-conviction relief in the form of a claim for deoxyribonucleic acid (DNA) analysis of physical evidence. *See* T.C.A. § 40-30-301 through -313 (2006) ("Post-Conviction DNA Analysis Act of 2001"). He claimed that the prosecutors withheld evidence in an effort to convict him "at all cost." He alleged that his trial counsel improperly failed to object to withholding evidence that some test results were "negative." He alleged that fingerprints and boot prints from the victim's apartment were "still in existence."

The post-conviction court ordered the State to respond to the petition, and in its response, the State listed the items of physical evidence that were collected in the petitioner's case. The State disclosed that "rape kits" were taken from the victim and the defendant but that no spermatozoa or semen was found. The State agreed that certain "biological material" was not tested and "could be tested if it still exists." This material included blood found on and possibly other bodily fluids from items collected from the victim's apartment, a hair sample found at the victim's apartment, blood found on and possibly other bodily fluids from the defendant's clothing, and hairs and other items included in the rape kits. The State's answer to the petition stated that the items of evidence that had not been destroyed and that remained in the criminal court clerk's office were a bloody pillow, the defendant's blue jeans and tee shirt, the victim's panties, and both parties' rape kits.

On August 4, 2005, after reviewing the State's response, the post-conviction court entered a thorough and detailed order in which it found that DNA analysis was warranted and, in the same order, appointed the public defender's office to represent the petitioner. The court further ordered the assistant district attorney general and the assistant public defender to "confer and submit an[] Agreed Order to the Court specifying which [qualified] laboratory . . . shall conduct the DNA testing and how the evidence shall be transported from the Criminal Clerk's Office evidence room to said laboratory." The order provided that, in the absence of an agreement, the court would select a laboratory.

On September 23, 2005, the post-conviction court entered a second order that announced that the parties had agreed upon the laboratory and the protocols for the DNA testing. The court ordered the testing of the victim's underwear, a bloody pillowcase from the victim's

apartment, the defendant's blue jeans and tee shirt, and the parties' rape kits. The court made detailed arrangements for the testing and the reporting of test results.

Test results were apparently furnished to the post-conviction court on July 21, 2006. On August 2, 2006, the court conducted a hearing, after which the court found:

The results of the . . . report were not favorable to Petitioner. The report indicated the following: (1) no semen recovered from the victim's panties, (2) victim's blood on the pillowcase recovered at the scene, (3) victim's blood on a t-shirt from defendant, (4) Petitioner's blood on jeans from Petitioner, and (5) inconclusive DNA results for blood tested on Petitioner's shoes.

The court concluded that because the results of the "post-conviction DNA analysis [were] not favorable to the petitioner," the petition must be dismissed.¹ The court ordered the physical evidence returned to the criminal court clerk's office. The petitioner filed a timely appeal.

On appeal, the petitioner claims that his trial counsel was ineffective for failing to present DNA evidence at his 1992 trial, that the public defender represented him both at trial and in the DNA post-conviction proceeding and, accordingly, had a conflict of interests, and that the DNA test results sufficiently exonerated the petitioner and show actual innocence.

Tennessee Code Annotated section 40-30-303 provides:

[A] person convicted of and sentenced for the commission of first degree murder, second degree murder, aggravated rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense, may at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.

T.C.A. § 40-30-303 (2006). The court shall order DNA analysis if it finds that:

(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;

¹ Although, at the August 2 hearing, the court referred to the DNA test results and mentioned that they were of record, the actual test results are not included in the appellate record.

(2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;

(3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and

(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Id. § 40-30-304.

If DNA testing is ordered and “[i]f the results of the post-conviction DNA analysis are not favorable to the petitioner, the court shall dismiss the petition, and make further orders as may be appropriate.” *Id.* § 40-30-312.

First, we address the petitioner’s claim that his trial counsel rendered ineffective assistance at trial in failing to address the issues of DNA evidence. Although a criminal defendant is entitled to the effective assistance of counsel, *see* U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *see also Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975), the “Post-Conviction DNA Analysis Act of 2001” makes no provision for challenging the effective assistance of trial counsel. The vehicle for doing so is generally the “Post-Conviction Procedure Act,” currently codified in Tennessee Code Annotated sections 40-30-101 through -122, which authorizes a collateral attack upon a conviction or sentence that is void or voidable because of the abridgment of any constitutional right, *see id.* § 40-30-103. However, this conventional post-conviction procedure required, at the time of the defendant’s convictions, that the petition for relief be filed within “three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken or consideration of such petition shall be barred.” *Id.* § 40-30-102 (1990) (amended 1995 Pub. Acts ch. 995) (establishing a one-year statute of limitations). The petitioner’s direct appellate process ended in 1994. He filed the petition presently under review in 2005. Thus, a conventional post-conviction claim of ineffective assistance of counsel is barred, and the petitioner is entitled to no relief on this claim.

Second, we address the petitioner’s claim made in his *pro se* brief that the public defender, who was appointed to represent the petitioner on the petition now under review, had a conflict of interests because the public defender’s office represented the petitioner at trial. The State argues in its brief that the petitioner waived the claim of conflict of interests by failing to raise the issue before the DNA post-conviction court.

We agree with the State. Generally, a claim that a defendant’s trial counsel has a conflict of interests in representing the defendant must be presented to the trial court. *See, e.g., State v. Locust*, 914 S.W.2d 554, 557 (Tenn. Crim. App. 1995) (stating that because the defendant knew of the conflict of interests of the public defender’s office prior to trial, “[a Tennessee Rule of

Criminal Procedure 12] pretrial motion should have been filed at that time. Had there been a conflict, the trial judge could have ruled on the issue . . .”). At any rate, the appellate court should not grant relief in contravention of the trial court – in this case, the post-conviction court. Tenn. R. App. P. 36(a).

Furthermore, we have determined above that the petitioner may not raise a claim of ineffective assistance of trial counsel in his post-conviction petition for DNA analysis. His legal inability to raise and pursue such a claim tends to defuse the potential for the public defender’s conflict in handling the post-conviction DNA proceeding.

Accordingly, we reject the claim of conflict raised for the first time on the petitioner’s appeal.

Third, the defendant claims that “the DNA evidence supports his claim of actual innocence and sufficiently exonerates him for the crime of aggravated rape.” He argues that the “evidence shows that there is no DNA evidence implicating [him] in the rape[s].” Essentially, the petitioner’s brief on this point merely rehashes the 1992 trial evidence and expresses his belief that the prosecution’s case was built upon circumstance and a tenuous identification of him by the victim.

The post-conviction DNA procedure act provides that “[i]f the results of the post-conviction DNA analysis *are not favorable to the petitioner*, the court shall dismiss the petition, and make further orders as may be appropriate.” T.C.A. § 40-30-312 (2006) (emphasis added). The failure of the DNA results to corroborate the State’s anecdotal trial evidence does not equate to the results being favorable to the petitioner. The post-conviction court fulfilled its duty in ordering the DNA testing of the available physical evidence that contained biological material. The court then reviewed the results and discerned no findings that were favorable to the petitioner; indeed, the tee shirt that had been shown to be that of the petitioner bore samples of the victim’s blood, a finding that was poignantly unfavorable to the petitioner. The court then followed the statutory directive and dismissed the complaint.

In conclusion, the petitioner enjoyed the optimum benefit afforded in his case pursuant to the post-conviction DNA procedure act. We hold that the record supports the criminal court’s rulings and affirm the dismissal of the petition.

JAMES CURWOOD WITT, JR., JUDGE